RE: LAND AT DEAN FARM, BROUGHTON

OPINION

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1. Introductory Matters

1.1 Those instructing me are presently preparing an application for outline planning permission for 32 dwellings on land at Dean Farm, Pudding Pie Nook Lane, Broughton, Preston ('the Site') on behalf of the Community Gateway Association (CGA) a registered provider of social housing based in Preston.

1.2 In policy terms, the site is located in the Open Countryside beyond the settlement boundary which is defined on the adopted Preston Local Plan Proposals Map. In policy terms in such a location new development is restricted, by Core Strategy Policy 1 and Preston Local Plan Policy EN1. The site is also located within an Area of Separation within Preston Local Plan Policy EN4 which further restricts development.

1.3 The policy which relates to affordable housing in rural areas is Preston Local Plan Policy HS4, which was adopted under previous versions of national guidance. The proposed development is intended to be promote as an "entry-level exception" site (ELES) within the meaning of §71 of NPPF, which provides:

> "71. Local planning authorities should support the development of entry-level exception sites, suitable for first time buyers (or those looking to rent their first home), unless the need for such homes is already being met within the authority's area. These sites should be on land which is not already allocated for housing and should:
> a. Comprise of entry-level homes that offer one or more types of affordable housing as defined in Annex 2 of this Framework; and
> b. Be adjacent to existing settlements, proportionate in size to them1, not compromise the protection given to areas or assets of particular importance in this Framework, and comply with any local design policies and standards."

1.4 On 29th April 2020 a pre-application meeting took place between those instructing me and

officers of the LPA in order to discuss the proposal. Prior to that meeting the LPA had been provided with various documentation to the effect that:

- there is a demonstrable need for affordable housing within the LPA's area.
- the site is on land which is not already allocated for housing.
- the proposed development would provide affordable housing within the meaning of Annex 2 of the NPPF – although the exact tenure mix is yet to be determined.
- the site is located adjacent to the settlement boundary of Broughton as defined on the Proposals Map.
- the site is less than 1ha in size and would not exceed 5% of the size of the existing settlement.
- the site is not subject or proximate to any particular designations save for countryside and the local area of separation.

1.5 The LPA officers who were present indicated that in their view, that the proposed development would conflict with the development plan (ie policies EN1 and Policy 1), and therefore would not be supported. In their view, the provisions of §71 of NPPF do not outweigh such a fundamental conflict within the development plan. Furthermore officers questioned whether the location of the site is in fact 'adjacent' to the settlement of Broughton, and whether the site is located sustainably with reference to the distance from local services and sustainable transport options. Officers also considered that the LPA can demonstrate a 5 year supply of deliverable housing such that the tilted balance is not engaged – a matter strongly challenged by those instructing me in another context.

1.6 The view of those instructing me is that the main point of dispute between themselves and officers of the LPA how the exception provided for in NPPF Paragraph 71 can be reconciled with adopted development plan policies as well as other parts of NPPF.

1.7 I am asked to advise as to the following:

(i) Would compliance with the criteria set out in NPPF §71 mean that a proposal comprised sustainable development such as to allow for permission to be granted despite conflict with other development plan policies, given that §71 is said to be as an 'exception'?

(ii) Should the development plan be considered 'out of date' in regard to the provision of affordable housing outside of settlements, given that it does not make provision for ELES. If so, should the 'tilted balance' therefore be engaged?

(iii) Is the site to be properly understand as being "adjacent" to the settlement?

(iv) What are the likely prospects of success in a s.78 appeal, assuming that PCC maintain their

current position?

(v) generally

2. Legal Context

2.1 Section 38(6) of the Town and Country Planning Act 1990 requires that applications are determined in accordance with the development plan taken as a whole[1], unless material considerations indicate otherwise. An important material consideration is the policy of the Secretary of State – provided that it is interpreted properly (see Gransden (E.C.) & Co. Ltd v Secretary of State for the Environment [1986] J.P.L. 519). The Interpretation of policy is a matter of law and not judgment (see Tesco v Dundee [2012] UKSC 13), however that does not mean that policy should be interpreted as if was a statute or examination answer, but rather with a sensible eye (per Lord Read in Dundee (supra) at §13).

2.2 Another important material consideration is whether or not policy is out of date. If policy is considered to be out of date then that may temper the weight to be given to any breach of policy.

2.3 At paragraph 45 of the judgment of Lindblom J in the case of Bloor Homes Limited v SoSCLG [2014] EWHC 754 (Admin**)** court gave its view on the meaning of "out-of-date" in the context of NPPF 2012[2]:

> *"45 These ["absence", "silence" and "out-of-date"] are three distinct concepts. A development plan will be "absent" if none has been adopted for the relevant area and the relevant period. If there is such a plan, it may be "silent" because it lacks policy relevant to the project under consideration.* ***And if the plan does have relevant policies these may have been overtaken by things that have happened since it was adopted, either on the ground or in some change in national policy, or for some other reason, so that they are now "out-of-date"****. Absence will be a matter of fact. Silence will be either a matter of fact or a matter of construction, or both.* ***And the question of whether relevant policies are no longer up-to-date will be either a matter of fact or perhaps a matter of both fact and judgment****."*(My emphasis)

2.4 In the later case of Gladman v Daventry Council [2016] EWCA Civ 1146 Sales LJ (as he then was) made the following key points from that judgment, when forming the planning judgment as to whether or not policy is out of date:

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1 "taken as a whole" is important and derives from s.38(3)(b). Recently endorsed in the case of Corbett v Cornwall [2020] EWCA Civ 508

2 The courts have agreed that the meaning of out of date in NPPF (2012) is equally applicable to NPPF (2019) – see Wavendon at [49].

(i) An Inspector must assess the conformity of a development plan policy with the NPPF and the weight to be accorded to those policies through that analysis [36].

(ii) The mere age of a policy does not cause it to cease to be part of the development plan [40(i)].

(iii) The weight to a policy may vary as circumstances change over time [40(ii)].

(iv) In obiter comments, Sales LJ stated that even though a LPA has granted permissions outside adopted settlement boundary policies, and relies on these permissions to show a 5YS, that does not necessarily render the settlement boundary policies out-of-date per se [44] and [45]. The decisions to grant permission for sites outside the settlement boundary will each have been made on their own facts.

(v) Rather the test for each application is the conformity of the policy with the terms of NPPF – to have policies to meet identified objectively assessed need. Plainly this can include where adopted policies do not produce enough land to meet identified need, where there is an acknowledged need to review boundaries and allocate land as part of an emerging plan

2.5 In Peel Investments Limited v SoSHCLG [2019] EWHC 2143 (Admin) Dove J observed that the key principle is that the test for out-of-datedness, going back to *Bloor Homes*, remains one of consistency with the National Policy[3] [65]:

> *Thus, the exercise required by paragraph 213 of the Framework and the* Bloor Homes *test is not one which is dictated simply by the passage of time, but rather an assessment of consistency of the Framework,* ***and the factual circumstances in which the policy is being applied*** *including, amongst other things, what the Inspector characterised as "results on the ground".* (emphasis added)

2.6 In the most recent case on this issue, Wokingham BC v SoSHCLG [2019] EWHC 3158 (Admin) Lang J at paragraph 60 observed:

> *As I have shown in my analysis of the Inspector's reasoning under Ground 1, his reasons were more extensive than the Claimant suggested, and they were based on a careful assessment by him, in accordance with the case law cited above. In my judgment,* ***the fact that the development limits in the policies were derived from the out-of-date housing requirements in***

[3] In that case, in England.

CP17 was clearly a relevant factor for the Inspector to take into account, and the Inspector's conclusion was a rational one which he was entitled to make*. It was not analogous to deciding that the policies were out-of-date merely on the basis of their chronological age; there was an issue of real substance here. As Lindblom J. said in Bloor Homes, at [19]:*

> *"The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court."* (emphasis added)

2.7 Lang J. accordingly found that the Inspector was lawfully entitled to reach the conclusion that the development limits were out of date because they were based on an out of dated housing requirement and therefore rightly reduced the weight to be given to the conflict with those policies.

2.8 From the above judgments, the following principles emerge:

(i) The decision as to whether or not a given policy is or is not out of date is a question of judgment[4] for the decision maker, provided that proper regard has had been had to relevant guidance.

(ii) Policies can be out-of-date for a variety of different reasons such as where they have been overtaken by events.

(iii) This includes, but is not limited to, conformity of a local plan policy with national policy.

2.9 Finally by way of legal overview of the authorities in respect of "out-of-datedness" it is important to note that in the seminal Supreme Court case of Suffolk Coastal v Hopkins [2012] UKSC 13, Lord Hoffman expressly found that the Inspector in the Cheshire East part of that case had been lawfully entitled to conclude that the settlement boundaries of the Crewe and Nantwich Local Plan were out of date because they had been fixed on the basis of a long superseded housing need:

> *"[The Inspector] was clearly entitled to conclude that the weight to be given to the restrictive policies was reduced to the extent that they derived from "settlement boundaries that in turn reflect out-of-date housing requirements""* (per Lord Hoffman at §63).

[4] Also confirmed in terms at §55 per Lord Hoffman in Suffolk Coastal v Hopkins [2013] UKSC 13

Discussion

3.1 The starting point for any consideration of a planning application therefore must be whether there is conformity or breach of the development plan taken as a whole. There may be policies which pull in different directions but it is then necessary to form a planning judgment as to whether there is compliance or conflict with the development plan overall (see Corbett (supra)).

3.2 In this case the proposals fall into the policy area covered by policy EN1 of the local plan and do not fall into any of the exceptions to that policy – thus it is breached. However the settlement boundaries which delineate where the division between settlement and countryside are drawn are derived from assessments of development needs which are now grossly out of date. On that basis therefore it is an important material consideration which tempers the weight to be afforded to that breach that the settlement boundaries do not reflect up to date needs. The position is exactly the same as facing the Inspector whose decision the Supreme Court concluded was lawful in the Hopkins Homes case quoted above.

3.3 Conflict with policy 1 of the Core Strategy is less clear cut. Firstly it is not a true development management policy but a policy which is designed to inform the next stage of plan preparation as to where development should be directed, it is very difficult to therefore concluded that an otherwise acceptable development would be in breach of the policy because it is not located in the higher order centres of Preston and Chorley or the named smaller centres. Thirdly Broughton would appear to fall within criterion (f) which expressly allows for small scale proposals to meet local needs and where there are exceptional circumstances, then larger scale developments.

3.4 Thus, a proposal to meet affordable & "entry level" housing needs for this scale of development could be cogently argued to fall under the descriptor of "local need" or even an "exception" to the generality of policy. Indeed even if it was said to fall outside of the scope of both then the obvious point is that this would be to interpret policy 1 in a way which did not admit of sites under §71 of NPPF and would therefore be out of date. In other words the LPA simply cannot have it both ways. Either it meets a local need or is in principle capable of being an exception or any breach of the policy ought to be afforded reduced weight because it is out of step with national

policy.

3.5 Since the Preston Local Plan was adopted national policy has gained additional sophistication in relation to housing need. Thus steps have been taken to positively encourage LPA's to take steps to meet needs as diverse as permanently low cost housing through to plots for self-build schemes. One of those needs which is now recognised in national policy is the provision of entry level housing which was plainly not part of national policy at the time that the Preston Local Plan was drafted. Thus, the restrictions on affordable housing provision under HS4 for rural exception sites for affordable housing was rightly imposed at the time, but there is no similar restriction within national policy for ELES/§71 schemes.

3.6 The fact that the proposals would conform to policy by exceptionally providing for affordable housing adjacent to a settlement (see below) but would not meet the criteria of a policy which is out of step with national policy, again means that the weight to be given to any conflict with such policy must be reduced since the policy is not up to date.

3.7 As to whether or not there is compliance with En4 or not – compliance is not binary – ie if one is within that area then there is a breach. Rather it requires a judgment to be formed as to whether a given proposal would compromise the function of the Area of Separation and undermine the effectiveness of the gap between settlements. This is a planning judgment for the decision maker based on all of the circumstances of the case.

3.8 Bringing those points together. Breach of En1 and HS4 must be tempered by the fact that both policies are not up to date. Policy 1 of the CS, probably understood probably isn't out of date provided that it is interpreted with §71 in mind; and En4 is a matter of planning judgment. Viewed overall therefore the proposals would appear to conflict with parts of the development plan which are to be viewed as out of date, but could be viewed as conforming to other parts (the last part of En1 and the start of Hs4). It seems to me that the better view is to concluded that the proposals are indeed in breach of the development plan taken as a whole, but that such a breach is with policies which are out of date and therefore the weight to be afforded to any such breach is substantially tempered as a result, and is readily capable of being outweighed if it can be clearly evidenced that the proposals comply with up to date national policy for entry level schemes for which there is a local need.

3.9 I note that those instructing me suggest that the reference to "exception" within the descriptor of §71 and the fact that they are not to be located on allocated sites might suggest that such sites should not come through the development plan system. I disagree. The better view is that the development plan system should make provision for ELES in a similar manner to former rural exception sites for affordable housing. The fact that the development plan in this area hasn't yet done so means that it is to be viewed as out of date since it is out of step with national guidance. That out of datedness both tempers the weight to be afforded to any breach of policy (supra) as well as amounting to a material consideration in its own right.

3.9 Thus, the next issue is whether or not there is compliance with §71 of NPPF or not. That in turn raises the following issues:

(i) is the need for entry level exception sites being met elsewhere on sites which are not allocated for housing?

(ii) is the proposal adjacent to the settlement boundary?

(iii) is the scale of the proposal proportionate to the settlement, based upon footnote 33 of NPPF;

(iv) would the proposals comply with design policy and not compromise the protection given to assets or areas.

If a proposal meets all of those criteria that does not mean that it must be granted planning permission. However if a proposal meets all of those criteria and the only policies of the development plan which are breached are out of date and/or the development plan does not properly make provision for an ELES then it is unlikely that a LPA could rationally conclude that the benefits arising from such a policy compliant[5] proposal would not significantly outweigh any breach of otherwise out of date policy.

3.10 Dealing with the first criteria, there is no evidence at all that the need for ELES schemes is being met elsewhere. Indeed whilst the LPA contends that it can demonstrate a 5 year supply of housing there is no suggestion that there is no need for entry level affordable housing for locals. To the contrary the draft planning statement provided by those instructing me to the LPA at the recent meeting demonstrates precisely the contrary. This criterion therefore appears to be readily met.

3.11 Similarly the third and fourth points at §3.9 (above) are also readily met. The

5 Ie compliant with national policy in §71

proposals would not compromise any designation or asset, it would not increase Broughton by more than 5% and given that this is an outline application there is no basis to conclude that design policies could not be met on any reserved matters application.

3.12 Thus, the only issue of contention is whether or not the proposal is or is not "adjacent to" an existing settlement. I note that the LPA have sought to argue that this doesn't just relate to physical adjacency, but how well connected the site is to existing facilities and services. With respect such an interpretation is nonsense. Whilst the accessibility of the site to existing services and facilities is of course a material consideration in its own right – it is an abuse of language to try to read "adjacency" as encompassing anything other than a physical relationship between the site and the settlement. Had the Secretary of State wanted the term to encompass a wider range of concerns such as accessibility then he would have said so.

3.13 Similarly the test is not physical adjacency of the site to the defined settlement boundary within a local plan (especially not an out of date settlement boundary). Again had the Secretary of State wished to import such a test into the NPPF he would have said so. Rather the policy puts the test as adjacency to the settlement.

3.14 The Site does not adjoin the existing settlement. Rather it adjoins the property which lies to the immediate east of the defined settlement and sits at the junction of Whittingham Lane and Pudding Pie Nook Lane . To the SW of the site it does adjoin the location of a site which lies outside of the defined settlement boundary but which was consented for residential development under reference 06/2017/1387. In the case of Wood v Secretary of State for Communities and Local Government [2015] EWCA Civ 195, the Court had to grapple with whether or not a proposal comprised infill "within a village", and it was contended that the Inspector had been right to equate that with the defined village boundary and did not need to form an independent view as to where the village physically existed. Sullivan L.J. rejected that contention and the decision was quashed on that basis. At §29 he observed:

"…it is clear that …"the boundary" to which the inspector was referring … was not his own assessment of the boundary of the village on the ground, but was the defined village boundary in the Local Plan, ….. That is the sole reason why the inspector concluded … that the appeal site did "not lie in a village, but outside the boundary", notwithstanding his earlier assessment in paragraph 13 of the extent of the built-up area on the ground. …..
30… on a fair reading of this decision the inspector did misdirect himself in the manner alleged in ground 1 of this appeal. It follows that the inspector's decision must be quashed"

3.15 I have no doubt that if the LPA in this case were to apply the first criterion of §71 of NPPF by reference to the village boundary then it will have fallen into exactly the same legal error as led to the quashing of the decision in Wood. Rather there is an obligation to consider whether the Site physically adjoins the physical extent of the settlement. On the basis of the information I have been provided with it is difficult to see how it could not be so concluded.

3.16 What is abundantly clear is that the test of §71 of NPPF does not important an assessment of accessibility into its scope. That said, as I note above, accessibility is of course a freestanding material consideration. However, when judging the proposal's locational suitability it should be carefully borne in mind that the expectation of policy is that such sites will necessarily come forward as an exception to the generality of sites and on the edge of settlements. It is therefore hardly fatal to such a proposal that its relationship to the services and facilities are what one would expect to see from a peripheral site to the settlement.

4. Conclusions

4.1 In answer to the specific questions raised in my instructions my views are in summary in italics following each of the questions raised:

(i) Would compliance with the criteria set out in NPPF §71 mean that a proposal comprised sustainable development such as to allow for permission to be granted despite conflict with other development plan policies, given that §71 is said to be as an 'exception'?

- *Not necessarily. Such a proposal which conformed with §71 is likely to comprise sustainable development, but other factors would need to be considered before arriving at an overall conclusion as to a site's acceptability.*

(ii) Should the development plan be considered 'out of date' in regard to the provision of affordable housing outside of settlements, given that it does not make provision for ELES. If so, should the 'tilted balance' therefore be engaged?

- *Yes. And whilst the approach to the tilted balance should be that of the Wavendon case (supra), the likelihood is that the tilted balance should be engaged, albeit that this is a matter of planning judgment, having weighed the basket of relevant policies.*

(iii) Is the site to be properly understand as being "adjacent" to the settlement?

- *Yes, for the reasons set out above.*

(iv) What are the likely prospects of success in a s.78 appeal, assuming that PCC maintain their current position?

- *Within the limits of my consideration – the prospects of success on appeal are good.*

(v) generally

- *See above.*

4.2 I advise accordingly. Should anything else please do not hesitate to contact me further.

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Paul G Tucker QC

17th May 2020